

92 MAR 25 AM 11:58

MARCH FONG EU  
SECRETARY OF STATE  
OF CALIFORNIA

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re:	)	1992 OAL Determination No. 4
Request for Regulatory	)	
Determination filed by	)	[Docket No. 90-013]
Jesse D. Clark concerning	)	
the California Medical	)	March 25, 1992
Facility-South's rule	)	
banning inmates from	)	Determination Pursuant to
wearing red and blue	)	Government Code Section
colors	)	11347.5; Title 1, California
	)	Code of Regulations,
	)	Chapter 1, Article 3

Determination by: MARZ GARCIA, Director

Herbert F. Bolz, Supervising Attorney  
Mathew Chan, Staff Counsel  
Regulatory Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not a rule issued by the chief deputy warden of one particular state prison under the control of the Department of Corrections, prohibiting inmates from wearing red or blue colored clothing, is a "regulation" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

Though expressing no opinion as to whether this local rule is in accord with other applicable law, the Office of Administrative Law has concluded that the local rule is not a "regulation."

R E A S O N S   F O R   D E C I S I O N

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

"The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

"In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.]<sup>10</sup>

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

March 25, 1992

statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 180 CCR pages. The Director's Rules were placed in the CCR in response to a 1976 legislative mandate which explicitly directed the Department to adopt its rules as regulations pursuant to the APA.<sup>18</sup>

For many years, the second tier consisted of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules.<sup>19</sup> The manuals are the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Outpatient Program Manual, the Parole Procedures Manual-Felon, and the Case Records Manual. In 1987, a completely revised Parole and Community Services Division ("PCSD") Operations Manual replaced both the Parole Procedures Manual-Felon and the Narcotic Addict Outpatient Program Manual. The Department is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of transferring all regulatory material from manuals into the CCR, and combining all six existing manuals into a single, more concise "CDC Operations Manual." So far, Volumes I, II, III, V, VI, VII, and VIII of the new "CDC [California Department of Corrections] Operations Manual" have been issued.

Manuals are updated by "Administrative Bulletins," which often include replacement pages for modified manual provisions. Manuals are intended to supplement CCR provisions. Until its deletion in October 1990, a preface to Chapter 1, Division 3, Title 15 of the CCR stated in part:

"Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures."

Courts have struck down portions of the second tier for failure to comply with APA requirements.<sup>20</sup> Prior to 1991, courts had invalidated the Classification Manual<sup>21</sup> and parts of the Administrative Manual<sup>22</sup> (and unincorporated "Administrative Bulletins").<sup>23</sup> In a September 1991 unpublished decision, the California Court of Appeal (Fifth Appellate District), ordered the Department to "cease enforcement of those portions of the Department of [sic] Operations Manual that require compliance with the [APA] pending proof of satisfactory compliance with the provisions of the Act."<sup>24</sup> Similarly, OAL regulatory determinations have found the Classification Manual,<sup>25</sup> several portions of

March 25, 1992

"no." In reaching this conclusion, we rely primarily on two factors: (1) the long-established legal line of demarcation between "the rules or regulations of the Department" and rules applying only to one particular institution and (2) the absurd consequences of deeming the APA to apply to local rules.

(1) Line of demarcation between statewide and institutional rules

California courts have long distinguished between statewide rules and rules applying solely to one prison.<sup>36</sup> In American Friends Service Committee v. Procunier,<sup>37</sup> the case which overturned a trial court order directing the Department to adopt its "rules and regulations" pursuant to the APA, the California Court of Appeal stated:

"The rules and regulations of the Department are promulgated by the Director and are distinguished from the institutional rules enacted by each warden of the particular institution affected." [Emphasis added.]<sup>38</sup>

Procunier is especially significant because it was this case which the Legislature in essence overturned by adopting the 1975 amendment to Penal Code section 5058 which made the Department subject to the APA. The controversy was over whether or not the Director's Rules, the rules "promulgated by the Director" (emphasis added) were subject to APA requirements.

This dichotomy between institutional and statewide rules continues to be reflected in more recent cases, such as Hillery v. Enomoto (1983). The Hillery court, though forcefully rejecting arguments that Chapter 4600 of the Administrative Manual did not violate the APA, carefully noted:

"This case does not present the question whether the director may under certain circumstances delegate to the wardens and superintendents of individual institutions the power to devise particular rules applicable solely to those institutions. Nor does it present the question whether the wardens and superintendents may promulgate such rules without complying with the APA. Although some institutions were exempted from certain provisions of the guidelines involved here, the guidelines at issue were (1) adopted by the Director of the Department of Corrections and (2) are of general applicability." [Emphasis added.]<sup>39</sup>

(2) Absurd Consequences

Requiring third tier ("local") rules to be adopted pursuant to the APA would have absurd consequences. Wardens would

March 25, 1992

3. The clothing policy is arbitrary and capricious, unnecessary and unclear.
4. The clothing policy infringes upon the rights guaranteed under the United States Constitution.

On December 28, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,<sup>42</sup> along with a notice inviting public comment. No public comments were received. The Department submitted a "Reply to Request for Determination" ("Response") on February 11, 1991. The Department argued in part that "the memorandum need not be adopted pursuant to the APA to the extent it is not a rule of general application."

## II. ISSUES

Before reaching the dispositive issues of this determination, we first clarify for the Requester the scope of our review. Upon a Request for Determination submitted pursuant to Government Code section 11347.5, OAL is required to provide a written determination as to whether or not the rule challenged by the Requester is or is not a "regulation," as defined under the APA. If the challenged rule is determined to be a "regulation," then the agency's failure to adopt the rule under the requirements of the APA renders the rule invalid and unenforceable. A contrary finding by OAL -- i.e., that the rule is not a "regulation" -- ,however, does not mean that OAL has determined the rule to be legally valid on all grounds.

When responding to a request for determination under Government Code section 11347.5, OAL does not analyze an agency rule to determine if the challenged rule meets the six substantive APA standards of "Necessity," "Authority," "Clarity," "Consistency," "Reference" and "Nonduplication." Such an analysis is required only when the rule has been submitted by the rulemaking agency to OAL pursuant to Government Code section 11349.1. Accordingly, this determination does not address the specific contentions outlined in the Requester's "Grievance Memorandum" to the Mens Advisory Committee.

We now turn to the key issues in this determination, which are:

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULE CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

March 25, 1992

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation[''] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ."

[Emphasis added.]

In Grier v. Kizer,<sup>45</sup> the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

First, is the challenged rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

" . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA."

[Emphasis added.]<sup>46</sup>

March 25, 1992

(4) Inmates who object to the content of particular institutional rules may file grievances within the prison system, and if relief is not forthcoming there, may easily (and without obtaining legal representation) petition for habeas corpus relief in superior court. These simple, no-cost procedures stand in sharp contrast to the complexity and expense faced by a wage earner, small businessperson, school district, etc., when the decision is made to litigate a troublesome informal rule. There is thus, in the [specific] prison context, less need for imposing stringent public notice and comment requirements. An inmate would likely have a small chance of success in filing a grievance against a statewide rule. Since local rules are subject to review by the Director, however, it is possible that a grievance directed at a local rule might be granted upon review by the Director.

(5) Most critical prison rules are statewide in nature and thus subject to APA requirements. Courts will require individual institutions to conform to duly adopted statewide rules, thus protecting affected parties from inconsistent local rules.<sup>55</sup>

(6) California prisons have recently experienced a substantial increase in the inmate population. Many new staff members have been hired to deal with the inmate influx. Thus, individual prisons are in particular need at this time of rules that inform both inmates and staff how recurring problems are to be resolved."<sup>56, 57</sup> [Original emphasis.]

The Requester has not demonstrated that the challenged rule has application beyond the walls of CMF-South. As the only evidence of the challenged rule is reflected in a memorandum issued by the Chief Deputy Warden of CMF-South and directed to the staff and inmate population of that institution, we cannot assume that the rule has application in any other correctional facility.

WE THEREFORE CONCLUDE THAT THE CHALLENGED RULE IS NOT A RULE OR STANDARD OF GENERAL APPLICATION.

Having found the challenged rule to fail the first part of the stated two-part test, we must also conclude that the challenged rule is not a "regulation" within the meaning of the key provision of Government Code section 11342, subdivision (b).<sup>58</sup> Consequently, the rule does not violate Government Code section 11347.5, subdivision (a).<sup>59</sup>

1. This Request for Determination was filed by Jesse D. Clark, who at the time of the filing of the request, was an inmate at California Medical Facility South. The Department of Corrections was represented by Tony Loftin, Assistant Chief, Regulation and Policy Management, (916) 327-4270.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "105" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No. 46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

In January 1992, a fourth survey of governing case law was published in 1992 OAL Determination No. 1 (Department of



(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." (Emphasis added.)

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL (916-323-6225) for a small charge.

5. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

March 25, 1992

and to permit OAL to devote its resources to analysis of truly contested issues.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of his Determination.
9. Government Code section 11347.5 provides:
  - "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation[''] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.
  - "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a ['']regulation[''] as defined in subdivision (b) of Section 11342.
  - "(c) The office shall do all of the following:
    1. File its determination upon issuance with the Secretary of State.

13. Penal Code section 5054.

14. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices. Individual agencies--not OAL--maintain individual agency rulemaking mailing lists.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.

16. Id.

17. For instance, Government Code section 11346.7, subdivision (b) requires a "final statement of reasons" for each regulatory action.

procedures as reflected in departmental manuals .  
 . . ." [Emphasis added.]

Section 240(c) of the Administrative Manual states:

"While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

20. These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the Department which would have specifically excluded the statewide procedural manuals from the APA adoption requirement.

Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5. This analysis contained a warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process . . . ."

21. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20; and Herships & Oldfield v. McCarthy (Super. Ct. Sacramento County, 1987, No. 350531, order issuing injunction regarding Classification Manual filed June 1, 1987.)
22. Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.
23. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20.
24. Tooma v. Rowland (F015383) (Sept. 9, 1991).
25. 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-74.

29. These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

"Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

"Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals.

"(a) Each institution . . . shall establish local procedures for all major program operations.

". . . .

"(b) Procedures shall be consistent with laws, rules, and departmental administrative policy . . . ." [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations. (See Administrative Manual section 242(d).) We simply refer to these documents as "operations plans."

30. AB 1270 (Sieroty/1971).
31. SB 1088 (Nejedly/1973).
32. American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
33. All three bills also concerned the Adult Authority (now the Board of Prison Terms). We will not discuss that facet of the legislation.

43. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
- 1989 OAL Determination No. 4 was upheld in May 1991 in a decision of the San Francisco Superior Court, which is currently being appealed by the losing side. State Water Resources Control Board v. Office of Administrative Law, SCN 906452; 1st DCA, Div. 1--No. AO 54599. Copies of the 30-page trial court statement of decision are available from OAL (phone Melvin Fong at (916) 324-7952) for a charge of \$7.00 (postage included).
44. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
45. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
46. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
47. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
48. (Department of Corrections, August 31, 1988, Docket No. 87-019), California Regulatory Notice Register 88, No. 38-Z, September 16, 1988, p. 2944.
49. 137 Cal.App.3d 736, 737.
50. Stoneham v. Rushen I (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135; Stoneham v. Rushen II (1984) 156 Cal.App.3d 302, 309, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.

March 25, 1992

Responsibilities at Correctional Institutions, 55  
Ops.Cal.Atty.Gen. 169, 170 (1972).

55. In re French (1980) 106 Cal.App.3d 77, 164 Cal.Rptr. 800  
(local practice inconsistent with CCR provision).
56. 1988 OAL Determination No. 13 (Department of Corrections,  
August 31, 1988, Docket No. 87-019), California Regulatory  
Notice Register 88, No. 38-Z, September 16, 1988, p. 2944,  
2960-61; typewritten version, pp. 17-18.
57. All notes in the quotation are original; they have been  
renumbered for inclusion in this Determination.
58. In light of this conclusion, it is not necessary for us to  
discuss whether the challenged rule falls within any  
established exception to the APA requirements.
59. Note that our finding is narrow. We do not address any of  
the contentions raised in the Requester's "Grievance  
Memorandum."

We point out, however, that the California Court of Appeal,  
First District, has recently upheld a warden's prohibition  
against prisoners wearing certain items of civilian  
clothing. (In re Alcala (1990) 222 Cal.App.3d 345, 271  
Cal.Rptr. 674.)